M-FOLD DEVELOPMENT SDN BHD

v.

ALTRUE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-51-99]
21 FEBRUARY 2002

CIVIL PROCEDURE: *Amendment - Defence - Whether plaintiff prejudiced - Delay in applying for amendment - Bona fides of application - Amendment did not depart from original defence - Application to amend made before trial - Whether amendment should be allowed - Whether plaintiff should be compensated with costs*

CIVIL PROCEDURE: *Pleadings - Amendment of defence - Whether plaintiff prejudiced - Delay in applying for amendment - Bona fides of application - Amendment did not depart from original defence - Application to amend made before trial - Whether amendment should be allowed - Whether plaintiff should be compensated with costs*

This was an appeal by the plaintiff against the decision of the senior assistant registrar ('SAR') allowing the defendant's application to amend its statement of defence.

The plaintiff claimed that there was inordinate delay on the part of the defendant to amend the statement of defence.

Held:

[1] The courts have always been magnanimous in allowing amendments to the pleadings. The proposed amendments did not add nor substitute a new cause of action. In fact, the facts of the case remained the same or substantially the same. (p 49 b)

[2] The reasons for the delay in filing the application for the proposed amendments were given and the court accepted them. Indeed, there was *bona fide* on the part of the defendant in seeking to amend the statement of defence. (p 49 c)

[3] The application to amend did not prejudice the plaintiff at all. The proposed amendments did not depart from the original defence. Therefore, there was no necessity to compensate the plaintiff with costs as there was no injustice or prejudice occasioned as a result of the proposed amendments. (p 50 a & e)

[4] The prominent feature in the present appeal would be that the defendant's application to amend the statement of defence was made before the trial. The trial had yet to begin and the proposed amendments were not prejudicial to the plaintiff. The proposed amendments were known to the plaintiff who had alluded to them in the statement of claim. The proposed amendments too were meant to synchronise with the defendant's version of the whole case. This was not a case where the defendant had acted in bad faith to amend the statement of defence. This was also not a case where the defendant sought to amend by proposing to introduce matters which had no relevance or were totally insignificant. It followed, therefore, that the SAR was right in allowing them. (p 52 a, c-e)

[Appeal dismissed.]

Case(s) referred to:

Abdul Johari Abdul Rahman v. Lim How Chong & Ors [1997] 1 CLJ 361 ***(foll)***
Algemene Bank Nederland NV v. Happy Valley Restaurant Pte Ltd [1991] 2 MLJ 289 ***(dist)***
Beswick v. Beswick [1966] Ch 538 ***(refd)***
Busch v. Stevens [1963] 1 QB 1 ***(refd)***
Clarapede & Co v. Commercial Union Association [1883-84] 32 WR 262 ***(refd)***
GL Baker Ltd v. Medway Building and Supplies Ltd [1958] 1 WLR 1216 ***(refd)***
Ketteman & Ors v. Hansel Properties Ltd [1988] 1 All ER 38 ***(refd)***
Khirod Behari Dutt v. Man Gobinda & Ors [1934] AIR Cal 682 ***(refd)***
Lawrance v. Lord Norreys [1888] 39 Ch D 213 ***(refd)***
Roe v. Davies [1875-76] 2 Ch D 729 ***(refd)***
Sneade v. Wotherton Barytes and Lead Mining Co Ltd [1904] 1 KB 295 ***(refd)***
Subbu Chetti v. Arunachalam Chettiar [1930] ILR 53 Madras 270 ***(refd)***
Taisho Co Sdn Bhd v. Pan Global Equities Bhd & Anor [1999] 1 CLJ 703 ***(foll)***
The Central Queensland Meat Export Co v. Gallop [1891-92] 8 TLR 225 ***(refd)***
The Duke of Buccleuch [1891-92] P 201 ***(refd)***
Tildesley v. Harper [1878-79] 10 Ch D 393 ***(refd)***
Warner v. Sampson & Anor [1959] 1 QB 297 ***(refd)***
Yamaha Motor Co Ltd v. Yahama (Malaysia) Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 ***(foll)***

Legislation referred to:

Contracts Act 1950, s. 2(d)
Rules of the High Court 1980, O. 20 rr. 5, 8, O. 24 r. 10, O. 34 r. 2

For the plaintiff - Harjinder Singh; M/s Ten Pereira Ng & Din
For the defendant - S Paul Krishnaraja; M/s Mohamad Jefri Anandaraj Paul & Assoc

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

Introduction

The defendant sought by way of a summons-in-chambers in encl. 13 to amend its statement of defence and the learned senior assistant registrar ("SAR") allowed the defendant's application. Aggrieved by that decision, the plaintiff filed a notice of appeal to the judge-in-chambers as seen in encl. 17. The defendant's application in encl. 13 was filed on 25 September 2000.

Facts Of The Case

Within a narrow compass, the facts may be stated as follows. The plaintiff sued the defendant for work done to the defendant's premises at number C-15, ground floor, mezzanine floor, and second floor, Jalan Selaman, Dataran Palma, Jalan Ampang, 68000 Kuala Lumpur (hereinafter referred to as the "premises"). At the material time, the defendant rented out its premises to a company known as Foodtracks Worldwide Sdn Bhd (hereinafter referred to as the "tenant"). The tenant engaged the plaintiff to carry out renovation and refurbishment works (hereinafter referred to as the "works") on the defendant's premises. It was an agreement between the tenant and the plaintiff wherein the latter undertook to renovate the defendant's premises at the behest of the tenant. The plaintiff duly completed the said works on the defendant's premises and, not having being paid, proceeded to sue the defendant instead of the tenant. It was the stand of the plaintiff that the defendant undertook to pay for those works. The stand of the defendant was quite simple in that there was no privity of contract between the parties and that the claim against the defendant was entirely baseless. In the statement of defence which was dated 3 March 1999 and filed on the next day as seen in encl. 5, the stand of the defendant was made known.

The Proposed Amendments To The Statement Of Defence

The defendant sought to amend paras. 5, 9, 10, 16 and 21 of the statement of defence. The proposed amendments brought into the picture and categorically specified that the defendant's premises was rented out to the tenant through a real estate agent known as Premium Properties and that the tenant was unable to pay the rental to the defendant and that the tenant had agreed that the works undertaken on the defendant's premises would be retained by the defendant in the event the tenant was unable to pay the rental. Should I allow the proposed amendments to the statement of defence and thereafter dismiss the appeal filed by the plaintiff? These were the questions of the day for this court to ponder.

Chronology Of Events

I have perused through the court file and managed to piece together the chronology of events in the following manner:

(1) On 29 December 1998, the plaintiff filed the writ of summons and the statement of claim in the commercial division and was given a court number *vide* D5-22-4765-1998 which eventually was converted into civil suit number S5-22-51-1999 and thereafter slotted to this court.

(2) On 11 February 1999, the defendant through Messrs Ten Pereira Ng & Din filed its memorandum of appearance.

(3) On 4 March 1999, the defendant filed its statement of defence.

(4) On 22 March 1999, the plaintiff filed their reply to the statement of defence.

(5) By notice dated 30 July 1999 which was filed on the same day as seen in encl. 8 and by way of a summons-in-chambers in encl. 10 under O. 24 r. 10 of the Rules of the High Court 1980 ("RHC"), the plaintiff through its counsel sought from the defendant and applied to the court respectively for the following documents:

(a) the tenancy agreement between the tenant and the defendant as reflected in paras. 5 and 9 of the statement of defence;

(b) the termination of the tenancy agreement between the tenant and the defendant as envisaged in para. 9 of the statement of defence;

(c) the cheques of the tenant that were returned to the defendant by the bank as alluded to in para. 10 of the statement of defence; and

(d) all the documents which would show that the tenant had agreed that the works carried out at the defendant's premises would be retained by the defendant in the event the tenant was unable to pay the rental.

(6) The plaintiff was in a deep slumber and did not take any positive step to move the civil suit for trial until this court issued a show cause notice dated 7 March 2000. It must be borne in mind that the pre-trial case management provisions, namely, the new O. 34 of the RHC only came into effect on 22 September 2000 by way of a gazette notification *vide* P.U. (A) 342, and, consequently, it was the duty of the plaintiff by virtue of the old O. 34 r. 2 of the RHC by way of a summons for directions to set down the action for trial.

Be that as it may, it was pointed out that the defendant had supplied the relevant documents to the plaintiff which showed that:

(i) the tenant had occupied the defendant's premises;

(ii) the tenant was unable to pay the rental to the defendant; and

(iii) the tenant had agreed to release the works to the defendant in lieu of the unpaid rental.

The Analysis Of The Evidence And The Law

It was urged upon me to allow the appeal in favour of the plaintiff because there was inordinate delay on the part of the defendant to amend the statement of defence by way of encl. 13. The delay came up to one year six months 21 days calculated from the time the statement of defence was filed, which was on 4 March 1999, to the time when encl. 13 was filed, which was on 25 September 2000. The defendant, by way of an affidavit evidence in encl. 12, advanced the reasons for the delay. It was this. That when the statement of defence was filed on 4 March 1999, the relevant supporting documents were not available as yet and now there was a need to amend the statement of defence because the relevant documents have been traced. It was also averred in encl. 12 that the crux of the defence remained unchanged in that there was no privity of contract between the parties thereto. It was further averred in encl. 12 that the application to amend the statement of defence would not prejudice the plaintiff at all.

Simply put, the doctrine of privity envisages a situation where the contract cannot confer rights or impose obligations arising under it on any person except the parties thereto. Thus, a person who is not a party to a contract has no right to sue on a contract. In *Subbu Chetti v. Arunachalam Chettiar* [1930] ILR 53 Madras 270, the court held that a stranger to the contract cannot sue to enforce it. The same principle was also enunciated by the court in *Khirod Behari Dutt v. Man Gobinda and Others* [1934] AIR Cal 682. It is now ideal to refer to the case of *Beswick v. Beswick* [1966] Ch. 538. There a coal merchant transferred his business to his nephew who made various promises in return. One of these was that he would, after the uncle's death, pay five pound per week to the uncle's widow. The uncle died and the widow became his administratrix. She brought an action to enforce the nephew's promise, suing both in her own right and as an administratrix. The House of Lords held that the widow could enforce the nephew's promise in her capacity as administratrix of the promisee and that she was entitled to an order of specific performance against the nephew, obliging him to make the payments to her for her personal benefit. But the House of Lords held that she could not enforce the promise in her personal capacity because she was not a party to the contract.

Even s. 2(d) of the Contracts Act 1950 which is of wide import does not whittle down the doctrine of privity of contract. That doctrine is here to stay.

And now to the heart of the matter.

The courts have always been magnanimous in allowing amendments to the pleadings. It must be borne in mind that the proposed amendments did not add nor substitute a new cause of action. In fact, the facts of the case remained the same or substantially the same and it would certainly be just to grant leave to amend. The reasons for the delay in filing the application for the proposed amendments have been advanced and I have no qualms in accepting them. Indeed there was *bona fide* on the part of the defendant in seeking to amend the statement of defence. This was the approach which I adopted and the same approach was also advocated by the Court of Appeal in the case of *Taisho Co Sdn Bhd v. Pan Global Equities Bhd & Anor* [1999] 1 CLJ 703.

It was wrong to argue as was argued by the plaintiff that the defendant had failed to explain the delay in amending the statement of defence. As demonstrated, the defendant had explained the delay and it was well documented in the affidavit in encl. 12. Abdul Malek Ahmad JCA (now FCJ) in *Abdul Johari b. Abdul Rahman v. Lim How Chong & 6 Ors* [1997] 1 CLJ 361, in a well written judgment, had this to say of amendments generally (see p. 374 of the report):

> The authorities strongly indicate that the courts should lean in favour of granting applications for amendments even when a new cause of action or line of defence is raised provided it is based on the same facts or arose out of the same transaction subject, however, to an award of costs to the other party for the injustice caused by the amendments. On these considerations, we agree with the learned Judge that as far as the amendments were concerned, there is no basic departure from the original pleadings which were grounded on the principles of equity.

Mohamed Azmi FJ delivering the judgment of the then Federal Court in the case of *Yamaha Motor Co. Ltd v. Yamaha (Malaysia) Sdn. Bhd. & Ors.* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428, which judgment was also alluded to in *Abdul Johari b. Abdul Rahman v. Lim How Chong & 6 Ors (supra)*, in style laid down the law in this way (see p. 371 of the report):

> The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is *bona fide* (2) whether the prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character. (See *Mallal's Supreme Court Practice* page 342).

I entirely agree with the averment in para. 9 of encl. 12 that the application to amend did not prejudice the plaintiff at all. The reasons are quite obvious. At para. 5 of the statement of claim, the plaintiff acknowledged the fact that the tenant was tenanting the defendant's premises as the first tenant and that the defendant had agreed to allow the plaintiff to do the necessary works to the defendant's premises at the behest of the tenant since the latter was interested in setting up a restaurant known as the "Basil Restaurant" at the defendant's premises. Again, at para. 8 of the statement of claim, the plaintiff deposed that the tenant was unable to pay the rental of the defendant's premises and this had prompted the defendant to terminate the tenancy. It was further averred in para. 8 of the statement of claim that the tenant did not pay the plaintiff for the works that had been carried out at the defendant's premises. Now, these two paragraphs of the statement of claim rendered the request for further and better particulars by the plaintiff in encls. 8 and 10 as an exercise in legal manoeuvrings which were designed to prolong the proceedings; and, in the alternative, encls. 8 and 10 were baseless because the plaintiff knew all along about the existence of that tenant. As a corollary thereto it would not be wrong to surmise that the defendant's application to amend the statement of defence was not designed to circumvent the plaintiff's application in encl. 10. The sum total of it all would be this. That the proposed amendments to the statement of defence did not depart from the original defence. There was thus no necessity to compensate the plaintiff by way of costs – thus departing as it were from the general principles as propounded in *Yamaha Motor* and *Abdul Johari b. Abdul Rahman* which general principles were meant to serve as mere guidelines. Why must the plaintiff here be compensated with costs when there was no injustice or prejudice occasioned as a result of the proposed amendments? Both *Yamaha Motor* and *Abdul Johari b. Abdul Rahman* envisaged injustice and prejudice that may be occasioned as a result of the amendments and suggested that costs be the best anecdote thereto. But here, as I said, there was no injustice nor prejudice experienced by the plaintiff as a result of that proposed amendments and so there was no necessity to award costs to the plaintiff.

I will now examine some English authorities.

Bramwell LJ in *Tildesley v. Harper* [1878-79] 10 Ch. D 393, aptly said at p. 396 to p. 397:

> My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.

and in the present context, the defendant was not acting *mala fide* nor did the defendant blundered its way as to cause injury to the plaintiff when the defendant filed an application to amend its statement of defence, and that being the case, leave to amend ought to be given.

According to Jenkins LJ in *G.L. Baker Ltd. v. Medway Building And Supplies Ltd.* [1958] 1 WLR 1216 at p. 1231, all amendments ought to be made "for the purpose of determining the real questions in controversy between the parties" to any proceedings or of correcting any defect or error in any proceedings.

According to the case of *Roe v. Davies* [1875-76] 2 Ch. D 729, 733, an amendment may be allowed "at any stage of the proceedings" (see also rr. 5 and 8 of O. 20 of the RHC), and, according, to the cases of *The Duke of Buccleuch* [1891-92] P. 201; and *G.L. Baker, Ltd. v. Medway Building & Supplies, Ltd. (supra)*, amendments may even be allowed before, or at, or after the trial, or even after judgment or on appeal. In *Clarapede & Co. v. Commercial Union Association* [1883-84] 32 WR 262, there was a delay of eight months and the court allowed an amendment of unseaworthiness after the original defence was delivered and after the return of the commission to record evidence abroad. It is now trite law that once an amendment has been allowed, the action continues as if the amendment had been inserted from the very beginning (per Hodson LJ in *Warner v. Sampson And Another* [1959] 1 QB 297, at p. 321 to p. 322; and according to the case of *Sneade v. Wotherton Barytes And Lead Mining Company, Limited* [1904] 1 KB 295, 297).

Of significance would be the judgment of *Ketteman and Others v. Hansel Properties Ltd* [1988] 1 All ER 38, where at p. 62 of the report his Lordship had this to say:

> Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. Furthermore, to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.

The prominent feature in the present appeal would be this. That the defendant's application to amend the statement of defence was made before the trial. By way of a comparison, reference ought to be made to the case of *Algemene Bank Nederland NV v. Happy Valley Restaurant Pte Ltd* [1991] 2 MLJ 289, where the defendants there had applied to amend the defence only after the plaintiffs had closed their case and the court held that as the proposed amendments were of a material nature, the plaintiffs would be unfairly prejudiced. Of course, factually speaking, the case of *Algemene Bank Nederland NV v. Happy Valley Restaurant Pte Ltd (supra)* were poles apart from the facts of the present appeal. Here unlike there, the trial had yet to begin and the proposed amendments were not prejudicial to the plaintiff. The proposed amendments were known to the plaintiff who had alluded to them in the statement of claim and those amendments too were meant to synchronise with the defendant's version of the whole case. This was not the case where the defendant had acted in bad faith to amend the statement of defence as envisaged in the case of *Lawrance v. Lord Norreys* [1888] 39 Ch. D 213 or even in the case of *Busch v. Stevens* [1963] 1 QB 1. This was also not the case where the defendant sought to amend by proposing to introduce matters which have no relevance or were totally insignificant as was done in the case of *The Central Queensland Meat Export Company v. Gallop* [1891-92] 8 TLR 225. Pure and simple, the proposed amendments that were sought were permissible under the law and this court had no choice but to entertain them. The SAR was perfectly right in allowing encl. 13.

Conclusion

For the reasons as adumbrated above, I would answer the two questions posed in the early part of this judgment in the positive and in the negative respectively. This meant that the proposed amendments to the statement of defence were allowed and the appeal as filed by the plaintiff in encl. 17 ought to be dismissed with costs forthwith.